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[SPECIAL JURISDICTION]

COBBETT, Ag. J.

June 12, 1936.

MALAYAN PALM OIL BULKING CO., LTD.

(Appellant)

v.

COMMISSIONER OF STAMPS, SINGAPORE

(Respondent).

[SINGAPORE ORIGINATING MOTION No. 10 of 1936]

Licence—terms indicating lease—adjudication of stamp duty.

A document described as a co-licence was presented to the Commissioner of Stamps for stamping and a stamp fee of $5.00 was tendered. Being of the opinion that the document amounted to a lease and an agreement under seal, the Commissioner certified that the proper stamp duty was $101.00 basing his assessment on the grounds that the lease was for a period exceeding three years at an annual rent of $6,000.00 and that there was a covenant to pay certain charges dependant upon the quantity of oil pumped. The document was expressed to be supplemental to two "licences" each of which carried a rental of $6,000.00. The "licence" provided, **inter alia**, that in consideration of the rent received the Grantors granted full and exclusive licence and authority to use the storage tank numbered 5 for the purpose only of receiving and storing therein and delivery therefrom by pump only oil being the produce of the licensees' estates or purchased by them together with full but not exclusive right and authority to have the use and benefit of the grantors' boilers, pumps, railways, pipes, pipelines and other machinery and works for the time being erected or installed in the Grantors' premises and adjoining premises and together with right and liberty for the licensees to enter upon the said premises and adjoining premises of the grantors. Clause 2 of the document provided for rent at $6,000.00 a year and for certain charges for pumping oil.

Held, on the true construction of the document, that it was a lease and that the principle of assessment adopted by the Commissioner was correct and that the proper stamp fee should be $197.00.

Cases referred to:—

(1) *Re Burmah Oil Shell Storage Co., Ltd.*, 55 Allahabad 874.

(2) *Daly v. Edwardes,* (1900) 83 L.T. 584; (1901) 85 L.T. 650.

(3) *Glenwood Lumber Co., Ltd. v. Phillips,* (1904) A.C. 405.

(4) *Harvey v. Walker Homfreys,* (1931) 1 Ch. D. 145.

(5) *Selby v. Greaves,* (1868) 3 Com. Pleas 594.

(6) *Taylor v. Caldwell,* 32 L.T. Q.B. 164.

(7) *Warr v. London Country Council,* (1904) 1 K.B. 113.

(8) *Young & Co. v. Liverpool Assessment Committee,* (1911) 2 K.B. 195.

CASE STATED under the provisions of S. 37 of the Stamps Ordinance 1929.

Withers Payne for the appellants.

N. A. Worley, Solicitor General, for the Respondent.

Cobbett, Ag. J.—On April 29th 1936 a document described as a Co-Licence dated 27.4.36 made between Bernam Oil Palms Ltd., of the 1st part, Malayan Palm Oil Bulking Co., Ltd., of the 2nd part and United Plantations Ltd., of the 3rd part was presented to the Commissioner of Stamps for stamping and a stamp fee of $5 was tendered. In the opinion of the Commissioner the document amounted to a lease and an agreement under seal. Subsequently the Commissioner was asked to adjudicate and he certified that the proper stamp duty was $101. He was asked to state a case and on 21.5.36 he gave his grounds for his decision.

(a) That the document is a lease for a period exceeding 3 years at an annual rent of $6,000.00 upon which the proper duty is $96.00.

(b) That there is a covenant to pay certain charges dependant upon the quantity of oil pumped and that in accordance with section 6 of the Stamps Ordinance the document was chargeable with further fee of $5.00 making $101.00 in all.

In fact the total amount is admitted to be wrong as the document is expressed to be supplemental to two "Licences" each of which carry a rental of $6,000.00 and it was not disputed that if the Commissioner's grounds are correct then the duty is payable on a rent of $12,000.00 a year. The amount would therefore be $192.00 plus $5.00 equal $197.00.

The applicants moved the Court for a declaration that the assessment is erroneous on the ground that the document is not a lease but a licence.

Two questions arose, firstly Is the document a lease or a licence? and secondly If it is a licence under which item or items of schedule A of the Stamps Ordinance should it be stamped? As I take the view that the document is in reality a lease there is no need to decide the 2nd question.

As the document is supplemental to two other documents which contained the full terms of the agreement between the parties and were referred to as "The Licences" it was to the Licences that the parties turned for their arguments. I therefore confine myself to the terms of the Licence which was put in marked J.B.P. 1 dated 14.12.35 and made between Malayan Palm Oil Bulking Co., Ltd., and Bernam Oil Palms Limited.

The licence recited (a) the Grantors title (b) the Grantors' intention to operate the premises as a service station (c) a clause of the Grantors' Memorandum of Association and (d) the agreement to grant and accept the grant of the licence thereafter contained. It witnesses that in consideration of the rent received the Grantors grant full and exclusive licence and authority to use the storage tank numbered 5 for the purpose only of receiving and storing therein and delivery therefrom by pump only oil being the produce of the Licensees' estates or purchased by them. Together with full but not exclusive right and authority to have the use and benefit of the Grantors' boilers, pumps, railways, pipes, pipelines and other machinery and works for the time being erected or installed in the Grantors' premises and adjoining premises and together with right and liberty for the Licensees to enter upon the said premises and adjoining premises of the Grantor. To hold and enjoy the said Licence rights and authorities hereby granted unto the Licensees from the 1st August 1934 to the 20th November 1947 subject to determination as provided and the provisions therein contained. Clause 2 provides for rent at $6000/- a year and for certain charges for pumping oil. Clause 3 contains the Licensees' covenants to pay rent and charges and to "keep and maintain the tank in good and substantial repair and condition and properly cleaned and painted to the satisfaction of the Company". The remaining Licensees covenants are of a restrictive nature and need not be considered more closely as they do not throw any further light on the question with the exception of (m) whereby the Licensees covenant not to create preferential security on the oil for the time being in the tank without the grantors' consent. It was stated this was by way of substitution for the right of distress which would have existed had the document been a lease. Clause 4 contains the Grantors' covenants which are mainly for the management of the pumping arrangements and the service station. Clause 5 contains a number of provisions of a general nature and a power to revoke the licence on non-payment of rents and for other causes.

By section 2 of the Stamps Ordinance 1929 a "lease means a lease of immoveable property and includes:

(a) Any undertaking in writing to cultivate, occupy or pay or deliver rents for immoveable property."

Ordinance 131 (Interpretation) section 2 has the following definition "Immovable property includes land, benefits to arise out of land and things attached to the earth or permanently fastened to anything to the earth".

It is a common ground that the tank is immovable property.

"A lease is a contract for the exclusive possession of lands or tenements for some certain number of years——. And a contract for such exclusive possession is a lease although there may be certain reservations or a restriction of the purpose for which the possession may be used and although it may be described as a Licence". *Woodfall's* Landlord & Tenant 22nd Edition p. 149. Reference is there made to *Glenwood Lumber Co., Ltd., v. Phillips,* 1904 A.C. 405, where the effect of the instrument being to give the holder an exclusive right of occupation of the land was held to be a demise even though described as a Licence and granted for the sole purpose of enabling the grantee to cut fell and carry away timber.

This seems to be conclusive against the applicant when it considered that the words used are "Full and exclusive licence and authority to use the storage tank". This can only mean exclusive possession of the tank. In my opinion 'licence and authority' are merely tautologous.

The applicant quoted a number of cases in support of his contention, principal among them being:

Taylor v. Caldwell,[6] *Daly v. Edwardes,*[2]
Warr v. London County Council,[7]
Walton Harvey v. Walker Homfrays,[4].

but in all these cases the *ratio decidendi* is that there is no interest in the land in the Licensee. And in not one of these was there anything approaching the exclusive possession necessary to found a lease.

Taylor v. Caldwell is a case where the defendant agreed to let certain gardens and music hall to the plaintiffs on four specified days for a series of concerts for a specified rent for each day. Blackburn J. said the whole agreement is such as to show that the defendants (the Grantors) were to retain possession

of the hall and gardens and he held that it was a mere licence.

In *Daly v. Edwardes,*[2] a licence was granted for the use of the refreshment rooms etc., in Daly's theatre. It was held that looking at the document as a whole the fair effect of it was that licence instead of a lease was really what was intended by the parties even though the words demise, rent and other words which if regarded from a strict conveyancer's point of view might be held to be the granting of an interest or an estate in some part of the theatre.

Lord Alverstone said "Concurrently with that exclusive use of portions of the premises during the time that they wanted to supply refreshment there was the right of audience to pass through to the other parts and the right of the landlord to go for the purpose of repairs and lighting and different things of that kind and also for getting at the stores which were jointly used". He held that there was an exclusive privilege to supply refreshments and the appropriation for the purpose of that privilege of certain spaces with the concurrent right on the part of Daly and his servants and visitors to the theatre to use such parts of those spaces as were not for the time being required in the due exercise by the licensees of the privilege they had.

In *Warr v. London County Council* the contract gave to the plaintiffs an exclusive right for a term of years to supply refreshment for the theatre and that for that purpose they should have the necessary use of the refreshment rooms etc. and an exclusive right to advertise in certain parts of the theatre. It was held that the contract did not confer an interest in the land on the licensee.

Waltons Harvey v. Walker Homfray is to much the same effect.

On the other hand the Commissioner produced cases which appear to me to be far more in accord with the case now under consideration, particularly in *Re Burmah Oil Shell Storage Co., Ltd.,*[1] and *Young & Co., v. Liverpool Assessment Committee*[8]. The Indian case was a stamping case under the Indian Stamp Act 2 of 1899 where a lease is defined in terms almost identical with those in our Stamps Ordinance. In that case the Company was to have the use or occupation of certain railway land belonging to the estate for the purpose of constructing petroleum storage installations and were to pay a certain monthly rent for the use of the plot. The Company were to erect certain constructions of a permanent character. The document was described as a licence and was revocable by seven days' notice on breach of certain conditions and either party could determine it by 3 months' notice at any time. The deed expressly provided that nothing contained in it should be construed to create a tenancy. The only substantial difference I can see between that case and the one under consideration was that the licensee was to erect the buildings whereas in this case building is already erected. Yet in the Indian case the document was held to be a lease.

The second case was a lease of certain section of a wharf and warehouse and it was argued that it was not a lease so as to make the occupiers rateable because they had not the exclusive use of the premises. But it was held that the nature of the respondents' business was not consistent with anything but exclusive occupation subject to the control of the Customs Authority and that the privileges given to the Board (which provided for special rights of access) were only occasioned by the fact that there was upon the demised property machinery which the Board wished to utilize during the term.

Other cases quoted by the Solicitor General were much to the same effect, notably, *Selby v. Greaves,*[5] but I do not consider it necessary to go further into these cases.

I therefore hold that the assessment of the Commissioner so far as it charges the document called a co-licence as a lease is right but the stamp fee should be $197/-. The applicants to pay the costs of the motion.

Commissioner's adjudication confirmed.

[IN THE COURT OF CRIMINAL APPEAL]

McELWAINE, C.J., GORDON-SMITH, Ag. J.A. & PEDLOW, J.

December 15, 1939.

T'NG BAN YICK v. REX.

[SINGAPORE CRIMINAL APPEAL No. 10 of 1939]

Penal Code, s. 34—Common intention—direction to Jury—propriety of.

The appellant and one who had not been brought to justice attempted to rob one O.C.Y. and in the course of a struggle stabbed O.C.Y. in the side and inflicted a wound from which he died about fourteen hours later. The appellant was convicted of murder, the prosecution resting its case on the allegation that the appellant had an intent common with X that the deceased should be